Supreme Court, U.S.
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No. 01-619

In the
Supreme Court of the United States

PATRICIA BRAGG, *et al.*,
Petitioners,

v.

WEST VIRGINIA COAL ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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The United States agrees with Petitioners that the court of appeals' decision "rests on a fundamental misunderstanding of SMCRA" and "is incorrect." U.S. Opp. at 13, 21. Nevertheless, the United States asserts that this Court's review of the Fourth Circuit's decision is not warranted because, although that decision is in "tension" with other federal appellate decisions, no other court has decided the "precise issue." *Id.* at 12-13. Even if the United States has properly defined the issue, certiorari is warranted here because of the Fourth Circuit's plain break with *Ex parte Young* and *Coeur d'Alene* and the exceptional importance of the legal issue at stake. Moreover, contrary to the United States' assertion, there is a direct conflict between the decision below and other federal circuit and state high court decisions interpreting SMCRA. In addition, the United States has defined the issue too narrowly, painting over the fundamental incompatibility of the Fourth Circuit's decision with other decisions concerning the federal enforceability of federal statutes based on cooperative federalism.

1. There Is a Direct Conflict with *Ex parte Young* and *Coeur d'Alene*.

The United States agrees that Petitioners' claims arise under federal law and "are cognizable in federal court under *Ex parte Young*." U.S. Opp. at 21. By rejecting those claims, the Fourth Circuit's decision conflicts with *Ex parte Young*, 209 U.S. 123 (1908). See Pet. 14-17. By basing that rejection, in part, on the availability of a state court remedy, the Fourth Circuit's decision also conflicts with *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Both the United States and Industry Respondents concede the latter conflict by failing to address it. The State Respondent asserts that there is no conflict with *Coeur d'Alene* because the Fourth Circuit was merely restating the truism that *Ex parte Young* is inapplicable when a state court is enforcing purely state law. State Opp. at 17. However, that is not what the Fourth Circuit did.

Instead, it relied on the availability of a state court remedy to protect "the *federal* interest in maintaining the State's compliance with its own program." App. 24a (emphasis added). In doing so, it relied on the 2-vote minority opinion in *Coeur d'Alene* for the proposition that, because West Virginia's "law specifically provides for its own enforcement in a State forum, the concerns that gave rise to the exception of *Ex parte Young* evaporate." App. 25a. That position was rejected by seven Justices in *Coeur d'Alene*. 521 U.S. at 292-93 (*Ex parte Young* "permit[s] federal actions to proceed even though a state forum *was* open to hear the plaintiff's claims") (O'Connor, Scalia, and Thomas, JJ., concurring) (emphasis in original); *id.* at 315-16 (the "notion that availability of a state forum should have some bearing on the applicability of *Ex parte Young* is thus as much as odds with precedent as with basic jurisdictional principles") (Souter, Stevens, Ginsburg, and Breyer, JJ, dissenting).

2. The Question Presented Is of Exceptional Importance.

The United States' brief in opposition confirms that this case is of critical importance. That brief acknowledges that the Fourth Circuit has issued a fundamentally wrong opinion on an important question of law with a major impact on enforcement of a critical federal program in the federal circuit most affected by surface coal mining. The government's exclusive focus on the absence of a direct conflict with the precise holding of the Fourth Circuit ignores the fact that certiorari is properly granted where "a court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). However narrowly one defines the relevant issue—and we believe the government's definition is superficial and cramped—this case is sufficiently important to justify this Court's attention at this time.

The United States' nine-page attack on the Fourth Circuit's

decision proves the point. The government confirms that that decision disrupts federal-government and private-citizen enforcement of an important federal statute that directly affects the public interest. The United States describes its "substantial, ongoing responsibility" to enforce SMCRA, including authority to conduct inspections, issue notices of violations, and even take over federal enforcement of a state program. U.S. Opp. at 15-16. The United States also confirms that "the function of the citizen suit provision at issue here is to ensure that the State does properly enforce its approved program." *Id.* at 20-21. The Fourth Circuit's decision that these federal provisions "drop out" after program approval eliminates these enforcement mechanisms, leaving the states in the Fourth Circuit (including West Virginia–the nation's second largest coal-producing state) with no effective federal oversight.

The practical impact of the Fourth Circuit's holding is not limited to the Eleventh Amendment immunity of state actors under SMCRA. Instead, it extends to the broader issue of whether a federally approved state program under a federal statute is federal law. As a result, that decision will not just affect SMCRA citizen suits against state officials under *Ex parte Young*. It will equally affect citizen suits against private companies (no federal question, hence no federal jurisdiction), federal government actions against private violators (again, no federal question jurisdiction unless the government has revoked approval of the state program), and federal government actions against states (same). Moreover, as we show in Part 4 below, the Fourth Circuit's decision goes so far that it jeopardizes the federal enforceability of not just SMCRA, but other federal environmental statutes (the Clean Air Act (CAA), Clean Water Act (CWA), and Resource Recovery and Conservation Act (RCRA)), because they share similar federal characteristics and SMCRA has the strongest federal character.

Furthermore, the Fourth Circuit's decision vacated an injunction

that would have prevented the continuing obliteration of hundreds of miles of streams in West Virginia. The U.S. Fish and Wildlife Service has found that "the loss of these streams and their associated forests may have ecosystem-wide implications." J.A. 281. As District Judge Haden stated in this case, the damage caused by filling streams with millions of tons of waste rock "cannot be regarded as anything but permanent and irreversible." *Bragg v. Robertson*, 54 F. Supp.2d 635, 646 (S.D.W.Va. 1999). If state officials cannot be compelled through citizen suits to enforce the environmental protections mandated in their state SMCRA programs, it could threaten a major portion of the streams and forests in Appalachia. Thus, the impact of this case on federal enforcement and environmental quality is a sufficient reason by itself to grant the petition for a writ of certiorari in this case.

3. There Is a Direct Conflict Concerning the Federal Enforceability of State Programs Under SMCRA.

The United States asserts that there is no conflict over "whether the Eleventh Amendment bars a SMCRA citizen suit against a state official alleging the violations of provisions of an approved state plan." U.S. Opp. at 21. This assertion disregards the fundamental disagreement between the Fourth Circuit and other federal and state appellate courts concerning the enforceability of federal SMCRA law after a state program is approved. The Fourth Circuit held that federal and state regulatory authority under SMCRA are "mutually exclusive," and that once a State has received federal approval of its state program, state law becomes the "sole operative law," and federal regulatory authority "drop[s] out." App. 20a-21a.

The D.C. Circuit reached the opposite conclusion when it reviewed the final federal regulations implementing SMCRA. That court spent four pages of its decision analyzing the allocation of

power between the federal government and the states. *In Re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 518-21 (D.C. Cir.) (en banc), *cert. denied*, 454 U.S. 822 (1981). It concluded that the federal government retains the authority to enforce an approved state program, and that this "oversight function is shared in part by the public, which is given the right to sue in federal court, *to compel compliance with the state program and its permits*." *Id.* at 519 (emphasis added). The Fourth Circuit's holding is incompatible with this conclusion.

The Fourth Circuit's decision also conflicts with three decisions of the West Virginia Supreme Court of Appeals. In each decision, that court held that "the requirements of the federal act [SMCRA] continue to have force and effect after the state program is approved." *Canestraro v. Faerber*, 374 S.E.2d 319 (W.Va. S.Ct. 1988). *Accord, DK Excavating, Inc. v. Miano*, 549 S.E.2d 280 (W.Va. S.Ct. 2001); *Antco, Inc. v. Dodge Fuel Corp.*, 550 S.E.2d 622 (W.Va. S.Ct. 2001). However, the Fourth Circuit's decision would dictate the opposite result, since it held that SMCRA has no effect as federal law after program approval.

The Fourth Circuit's holding would have similarly dictated a different result in *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995). In that case, the plaintiff brought a citizen suit against a Wyoming state official under § 1270(a)(2) of SMCRA. The Tenth Circuit held that the Eleventh Amendment did not bar the district court from entering a declaratory judgment that the attorney fee provisions in Wyoming's approved state plan violated SMCRA. *Id.* at 1483. However, under the Fourth Circuit's ruling, that same suit would have to be dismissed because Wyoming was administering state law, and federal SMCRA law would have "drop[ped] out."

The Fourth Circuit's decision is plainly incompatible with these decisions and that conflict warrants the Court's review.

4. There Is a Direct Conflict Concerning the Federal Enforceability of State Programs Under Other Federal Environmental Statutes.

The United States admits that the Fourth Circuit's decision "is, indeed, in tension" with the many appellate decisions that recognize the federal character of federally approved state programs under "cooperative federalism" statutes. U.S. Opp. at 12-13, 23 n.6. However, by framing the "precise issue" narrowly as arising only under SMCRA, the United States understates the unprecedented breadth of the Fourth Circuit's decision, and thereby artificially minimizes the true conflict over a broader issue.

In fact, state programs under SMCRA have a *stronger* federal character than state programs under other federal environmental statutes. By rejecting the federal enforceability of a federal environmental statute with a strong federal character, the decision below runs headlong into the many federal appellate decisions that have held that state programs under other federal environmental statutes are federally enforceable, even though these programs have a weaker federal character. Pet. at 26-28; U.S. Opp. at 23 n.6.

Four characteristics of approved state SMCRA programs show that they have a strong, if not the strongest, federal character. First, SMCRA authorizes the federal government and citizens to enforce approved state programs against regulated entities such as permittees. 30 U.S.C. §§ 1270, 1271. The Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act also authorize such enforcement. 33 U.S.C. §§ 1319, 1365; 42 U.S.C. §§ 7413, 7604; 42 U.S.C. §§ 6928, 6972. However, SMCRA is the *only* federal statute that allows citizens to sue the state regulatory authority itself in federal court for its failure to perform the nondiscretionary duties in its state program. 30 U.S.C. § 1270(a)(2). It is also the *only* federal environmental statute that

expressly provides that the availability of state judicial review shall not affect the right to bring a federal citizen suit. 30 U.S.C. § 1276(e). The CWA, CAA, and RCRA do not contain any comparable provisions, and therefore have a weaker federal character. If the Fourth Circuit is right that these strong federal provisions do not create federal enforceability under SMCRA, then its decision necessarily is in conflict with the numerous federal decisions upholding the federal enforceability of the CWA, CAA, and RCRA, where those provisions are absent.

Second, SMCRA expressly provides that primacy states must comply with their approved state programs. 30 U.S.C. § 1260(b)(1). As the United States admits, that statute "mandates that state officials adhere to that requirement, and that *federal* law is violated if a state official fails to do so." U.S. Opp. at 14 (emphasis in original). Again, SMCRA is the *only* federal environmental statute to contain such a provision. The CWA, CAA, and RCRA do not contain any comparable provisions, and therefore have a weaker federal character. If the Fourth Circuit is right that this federal mandate does not create federal enforceability under SMCRA, then its decision necessarily is in conflict with the numerous federal decisions upholding the federal enforceability of the CWA, CAA, and RCRA, where those mandates are absent.

Third, as the United States admits (U.S. Opp. at 3), approved state SMCRA programs are codified as federal law in the Code of Federal Regulations. 30 C.F.R. §§ 900.11, 900.12(a). In that respect, they have at least as strong, if not a stronger, federal character than State Implementation Plans under the CAA and state water quality standards under the CWA, which are not codified, but are incorporated by reference into federal regulations. 40 C.F.R. § 52.02 (CAA); 40 C.F.R. § 122.4(d) (CWA). None of the respondents has successfully distinguished this case from *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992), where this Court held that

this CWA regulation made those state standards "part of the federal law of water pollution control." Since the SMCRA regulation is equal to or stronger than the CWA regulation, the Fourth Circuit's decision necessarily conflicts with *Arkansas*.

Fourth, state SMCRA programs do not become effective either initially, or through amendments, unless they are approved by the federal government. 30 U.S.C. §§ 1253(a); 30 C.F.R. § 732.17(g); U.S. Opp. 3. In that respect, they are the same as approved state programs under the CWA, CAA, and RCRA. 33 U.S.C. § 1342(b); 42 U.S.C. §§ 7410, 7412(l); 42 U.S.C. §§ 6926(b), 6947(a). By holding that this characteristic is insufficient to create federal enforceability, the Fourth Circuit's decision jeopardizes the federal enforceability of these other statutes as well as SMCRA.

Respondents, and the Fourth Circuit, rely on a fifth characteristic–the "exclusive jurisdiction" clause–to nullify all of these other four characteristics and thereby to eviscerate the *entire* federal character of SMCRA. However, as the United States explains, that clause "merely confirm[s] that '[a]s long as the state properly enforces its approved program, it is the exclusive 'on the scene' regulatory authority.'" U.S. Opp. at 20 (quoting *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d at 519). Thus, primacy states administer approved programs, but citizens and the federal government have continuing authority to invoke the jurisdiction of the federal courts to ensure that states comply with their responsibilities under those programs. *Id.* at 20-21.

The structure of SMCRA supports this conclusion, because the administration and enforcement of state programs are addressed in separate sections. Section 1253 refers to the state's "exclusive jurisdiction over the *regulation*" of surface mining in a state, but Sections 1270 and 1271 separately authorize enforcement of that regulatory program by citizens and the federal government. 30 U.S.C. §§ 1253(a), 1270, 1271. As a result, as the Fourth Circuit

itself held in *Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231, 236 (4th Cir. 1997), "[e]xclusive *regulatory* jurisdiction simply does not encompass exclusive *adjudicatory* jurisdiction" (emphasis added). Congress did not assign both the administration and enforcement of the state program exclusively to primacy states. Thus, the "exclusive jurisdiction" language does not give SMCRA a less federal character than other environmental statutes.[1]

Nevertheless, the United States argues that this language about "exclusive jurisdiction" is "the crucial feature distinguishing SMCRA from other cooperative-federalism statutes" and provides sufficient reason by itself to eliminate any conflict between the Fourth Circuit's decision and decisions by other appellate courts. *Id.* at 24. This argument is flatly inconsistent with the United States' earlier insistence that this "basic premise" of the Fourth Circuit's decision "rests on a fundamental misunderstanding of SMCRA." *Id.* at 13.

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[1]This confusion over the meaning of terms like "exclusive jurisdiction" is not unique to SMCRA. RCRA provides that an approved state program operates "in lieu of" a federal program. 42 U.S.C. § 6926(b). This language has generated a similar conflict among the federal courts. The Eighth Circuit has held that this language "reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement." *Harmon Industries v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999). In contrast, the First and Ninth Circuits and several district courts have reached the opposite conclusion that administration and enforcement of state RCRA programs are not inexorably intertwined, and that the United States retains its authority to enforce those programs in federal court. *U.S. v. Elias*, 269 F.3d 1003, 1009-13 (9th Cir. 2001); *U.S. v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991); *U.S. v. Murphy Oil U.S.A., Inc.*, 143 F. Supp.2d 1054, 1114-17 (W.D. Wis. 2001); *U.S. v. Flanagan*, 126 F. Supp.2d 1284, 1286-91 (C.D. Cal. 2000); *U.S. v. Power Engineering Co.*, 125 F. Supp.2d 1050, 1058-61 (D. Colo. 2000), *appeal pending*, No. 01-1217 (10th Cir.). Thus, a grant of certiorari here would likely resolve, or at least provide authoritative guidance on, the proper interpretation of RCRA's "in lieu of" language.

The United States cannot have it both ways. It cannot argue that the basic premise of the court of appeals' decision is wrong, but that same mistaken premise completely resolves the conflict with other federal court decisions.

By rejecting the federal enforceability of a federal environmental statute with a strong (if not the strongest) federal character, the Fourth Circuit's decision has consequences that extend far beyond SMCRA, and simultaneously undermines the federal enforceability of other federal environmental statutes with a weaker federal character. Review in this case can therefore resolve this conflict concerning the federal enforceability of federal environmental statutes based on cooperative federalism.

* * *

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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